

1 DAVID J. MERRILL
Nevada Bar No. 6060
2 MORGAN F. SHAH
Nevada Bar No. 12490
3 DAVID J. MERRILL, P.C.
10161 Park Run Drive, Suite 150
4 Las Vegas, Nevada 89145
Telephone: (702) 566-1935
5 Facsimile: (702) 993-8841
E-mail: david@djmerrillpc.com
6 Attorneys for WELLS FARGO BANK, N.A.

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11 UNITED STATES DISTRICT COURT
12 DISTRICT OF NEVADA

13 DIMITRITZA TOROMANOVA, an
Individual,

14 Plaintiff,

15 vs.

16 WELLS FARGO BANK, N.A.; WACHOVIA
17 MORTGAGE, FSB; WORLD SAVINGS
BANK, FSB; NATIONAL CITY
18 MORTGAGE; NATIONAL DEFAULT
SERVICING CORP; GOLDEN WEST
19 SAVINGS ASSOCIATION SERVICE CO.;
and DOES 1-10, inclusive,

20 Defendants.
21

Case No.: 2:12-cv-00328-GMN-(CWH)

22 **WELLS FARGO BANK, N.A.'S MOTION TO DISMISS AMENDED COMPLAINT**

23 Defendant Wachovia Mortgage, a division of Wells Fargo Bank, N.A., formerly known
24 as Wachovia Mortgage, FSB, formerly known as World Savings Bank, FSB ("Wells Fargo")
25 moves this court for an order dismissing the plaintiff's, Dimitritza Toromanova ("Toromanova"),
26 Amended Complaint with prejudice pursuant to Fed. R. Civ. P. 12(b)(6). Wells Fargo bases this
27 motion on the following memorandum of points and authorities, the papers on file with this
28 Court, including the Amended Complaint, any documents incorporated by reference or attached

1 to the Amended Complaint, recorded documents which the Court may take judicial notice of, and
2 any oral argument that this Court may entertain.

3 DATED this 6th day of August 2012.

4 DAVID J. MERRILL, P.C.

5
6 By:



DAVID J. MERRILL
MORGAN F. SHAH
10161 Park Run Drive, Suite 150
Las Vegas, Nevada 89145
(702) 566-1935

7
8
9 Attorneys for WELLS FARGO BANK, N.A.

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11 **MEMORANDUM OF POINTS AND AUTHORITIES**

12 **I. INTRODUCTION**

13 Toromanova commenced this action by filing a complaint in state court on February 10,
14 2012. After removing the action to this Court, Wells Fargo filed a motion to dismiss pursuant to
15 Fed. R. Civ. P. 12(b)(6). On June 25, 2012, this Court entered an Order granting Wells Fargo's
16 motion without leave to amend as to Wells Fargo. Nevertheless, Toromanova subsequently filed
17 an Amended Complaint that includes numerous claims against Wells Fargo. However, because
18 Toromanova's claims against Wells Fargo were dismissed twice previously, Toromanova's
19 claims are barred by *res judicata*. Accordingly, Wells Fargo respectfully requests that this Court
20 grant its motion to dismiss the amended complaint and enter an order dismissing Toromanova's
21 claims with prejudice.

22 **II. STATEMENT OF FACTS**

23 The property involved in this action is located at 2912 Hot Cider Avenue, North Las
24 Vegas, Nevada 89031 (the "Property"). In March 2006, Toromanova executed an Adjustable
25 Rate Mortgage Note Pick-A-Payment Loan (the "Note") and Deed of Trust in favor of World
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1 Savings Bank, FSB (“World Savings”) for \$288,000.¹ The lender and beneficiary of the Deed of
 2 Trust was World Savings.²

3 On or about December 31, 2007, World Savings changed its name to Wachovia
 4 Mortgage, FSB (“Wachovia Mortgage”).³ Effective November 1, 2009, Wachovia Mortgage
 5 merged with and into Wells Fargo Bank, N.A. and is now known as Wachovia Mortgage, a
 6 Division of Wells Fargo Bank, N.A.⁴ Wachovia Mortgage (and its predecessor, World Savings)
 7 was a federal savings bank regulated by the Office of Thrift Supervision (“OTS”).⁵

8 On August 27, 2010, a Notice of Default and Election to Sell Under Deed of Trustee (the
 9 “Notice of Default”) was recorded.⁶ At that time, Toromanova was \$25,840.85 in arrears.⁷
 10 Toromanova failed to cure the default and did not elect to participate in the Nevada Foreclosure
 11 Mediation Program.⁸ Consequently, a Notice of Trustee’s Sale was recorded on January 26,
 12 2011.⁹ The trustee’s sale was scheduled to take place on February 16, 2011.¹⁰ However, on

13 ¹ See Deed of Trust (Doc. 1-2 at 17), attached to the Petition for Removal (the “Petition”) as Exhibit A; *see*
 14 *also* Note (Doc. 5-1), attached to Wells Fargo Bank, N.A.’s Opposition to Plaintiff’s Motion for Preliminary
 Injunction (the “Opp. to Mot. for Prelim. Inj.”) as Exhibit 1.

15 ² See Deed of Trust at 1.

16 ³ See Federal Deposit Insurance Corporation notice and history of World Savings Bank’s name change to
 17 Wachovia Mortgage (Doc. 5-2), attached to the Opp. to Mot. for Prelim. Inj. as Exhibit 2. Wells Fargo respectfully
 18 requests that the Court take judicial notice of the notice and history of World Savings Bank’s name change to
 Wachovia Mortgage, as it is a “document reflecting official acts of the executive branch of the United States and
 19 that they are judicially noticeable pursuant to Rule 201(b)(2) of the Federal Rules of Evidence.” *Gonzalez v. Wells*
Fargo Bank, FSB, No. C11-00247, 2011 WL 1877219, at *1 n.2 (N.D.Cal. May 17, 2011).

20 ⁴ See Official Certification of the Comptroller of the Currency regarding merger (Doc. 5-3), a copy of which
 is attached to the Opp. to Mot. for Prelim. Inj. as Exhibit 3. Wells Fargo respectfully requests that the Court take
 21 judicial notice of the Official Certificate of the Comptroller of the Currency as it is a “document reflecting official
 acts of the executive branch of the United States and that they are judicially noticeable pursuant to Rule 201(b)(2) of
 22 the Federal Rules of Evidence.” *Gonzalez v. Wells Fargo Bank, FSB*, No. C11-00247, 2011 WL 1877219, at *1 n.2.

23 ⁵ See Charter of Wachovia Mortgage (Doc. 5-4), attached to the Opp. to Mot. for Prelim. Inj. as Exhibit 4.
 Wells Fargo respectfully requests that the Court take judicial notice of the Charter of Wachovia Mortgage as it is a
 24 “document reflecting official acts of the executive branch of the United States and that they are judicially noticeable
 pursuant to Rule 201(b)(2) of the Federal Rules of Evidence.” *Gonzalez v. Wells Fargo Bank, FSB*, No. C11-00247,
 25 2011 WL 1877219, at *1 n.2.

26 ⁶ See Notice of Default (Doc. 1-2 at 33), attached to the Petition as Exhibit A.

27 ⁷ *Id.*

28 ⁸ See Mediation Certificate (Doc. 5-5), attached to the Opp. to Mot. for Prelim. Inj. as Exhibit 5.

⁹ See Notice of Trustee’s Sale (Doc. 5-6), attached to the Opp. to Mot. for Prelim. Inj. as Exhibit 6.

December 17, 2010, Toromanova filed a Complaint with this Court against Wells Fargo and others concerning the Property.¹¹ In addition, Toromanova recorded a Notice of Lis Pendens on February 14, 2011.¹² Upon Wells Fargo's motion, the Court dismissed Toromanova's complaint and released the *lis pendens* in an order dated August 17, 2011.¹³ Accordingly, another Notice of Trustee's Sale was recorded on September 1, 2011 and a sale was scheduled for October 3, 2011.¹⁴ A Trustee's Deed Upon Sale was recorded on October 11, 2011.¹⁵

Undeterred by this Court's prior dismissal of her action, on February 10, 2012, Toromanova filed another complaint, this time in state court, and also filed a Motion for Preliminary Injunction.¹⁶ The state court did not take any action regarding the Motion for Preliminary Injunction.¹⁷ Wells Fargo removed the action to this Court on February 29, 2012.¹⁸ On March 1, 2012, Wells Fargo filed its Opposition to Toromanova's Motion for Preliminary Injunction (Doc. 5). On March 9, 2012, this Court entered an order denying Toromanova's Motion for Preliminary Injunction (Doc. 10).

On March 7, 2012, Wells Fargo filed a Motion to Dismiss and Expunge Lis Pendens (the "Motion to Dismiss") (Doc. 7).

On June 4, 2012, Toromanova filed an Ex Parte Application for Stay of Enforcement of Temporary Writ of Restitution in Unlawful Detainer Action and Preliminary Injunction (the "Application") (Docs. 18 and 19). On June 21, 2012, Wells Fargo filed its Opposition to the Application (Doc. 20).

¹⁰ *Id.*

¹¹ *See* Quo Warranto Complaint (Doc. 1), Case No. 2:10-cv-02193-PMP-(GWF).

¹² *See* Notice of Lis Pendens (Doc. 5-7), attached to the Opp. to Mot. for Prelim. Inj.as Exhibit 7.

¹³ *See* Order (Aug. 17, 2011) (Doc. 21), Case No. 2:10-cv-02193-PMP-(GWF).

¹⁴ *See* Notice of Trustee's Sale (Doc. 1-2 at 36), attached to the Petition as Exhibit A.

¹⁵ *See* Trustee's Deed Upon Sale (Doc. 5-8), attached to the Opp. to Mot. for Prelim. Inj.as Exhibit 8.

¹⁶ *See generally* Compl. (Doc. 1-2); *see also* Mot. for Prelim. Inj. (Doc. 4-3 at 6).

¹⁷ *See* State Court Docket (Doc. 5-9), attached to the Opp. to Mot. for Prelim. Inj.as Exhibit 9.

¹⁸ *See generally* Petition.

On June 25, 2012, the Court entered an Order denying the Application and granting Wells Fargo's Motion to Dismiss, concluding that *res judicata* barred Toromanova's claims.¹⁹ The Court further dismissed with prejudice Toromanova's first and second causes of action, but granted Toromanova leave to amend her third and fourth causes of action against NDSC.²⁰ The Court did not permit Toromanova to assert new claims against Wells Fargo.²¹

Nevertheless, again undeterred by this Court's orders, on July 18, 2012, Toromanova filed an Amended Complaint (Doc. 22) that purports to add defendants and again attempts to plead numerous claims against Wells Fargo. However, as this Court previously concluded, *res judicata* bars Toromanova's claims and Toromanova still fails to state a claim upon which relief can be granted. Accordingly, the Court should again enter an order dismissing Toromanova's claims against Wells Fargo with prejudice.

III. ARGUMENT

A. Rule 12(b)(6) Legal Standard

A motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6) can be based on the failure to allege a cognizable legal theory or the failure to allege sufficient facts under a cognizable legal theory.²² To withstand a motion to dismiss pursuant to Rule 12(b)(6), a complaint must set forth factual allegations sufficient "to raise a right to relief above the speculative level."²³

While a court considering a motion to dismiss must accept as true the allegations of the complaint in question,²⁴ must construe the pleading in the light most favorable to the party opposing the motion, and resolve factual disputes in the pleader's favor,²⁵ the allegations must be

¹⁹ See Order (Jun. 25, 2012) (Doc. 21).

²⁰ *Id.*

²¹ *Id.*

²² *Robertson v. Dean Witter Reynolds, Inc.*, 749 F.2d 530, 534 (9th Cir. 1984).

²³ *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007).

²⁴ *Hosp. Bldg. Co. v. Rex Hosp. Trs.*, 425 U.S. 738, 740 (1976).

²⁵ *Jenkins v. McKeithen*, 395 U.S. 411, 421 (1969).

1 factual in nature.²⁶ Rule 8 “does not require ‘detailed factual allegations,’ but it demands more
2 than an unadorned, the-defendant-unlawfully-harmed-me accusation.”²⁷

3 The Ninth Circuit follows the methodological approach set forth in *Iqbal* for the
4 assessment of the Complaint:

5 [A] court considering a motion to dismiss can choose to begin by identifying pleadings
6 that, because they are no more than conclusions, are not entitled to the assumption of
7 truth. While legal conclusions can provide the framework of a complaint, they must be
8 supported by factual allegations. When there are well-pleaded factual allegations, a court
9 should assume their veracity and then determine whether they plausibly give rise to an
10 entitlement to relief.²⁸

11 A district court may consider materials in a 12(b)(6) motion to dismiss that are not part of
12 the pleadings but that are ‘matters of public record’ of which the court may take judicial notice
13 pursuant to Federal Rule of Evidence 201.²⁹

14 **B. Toromanova’s claims are barred by *res judicata*.**

15 On December 17, 2010, Toromanova filed her first complaint against Wells Fargo, and
16 others, concerning the subject property with this Court.³⁰ However, Toromanova’s complaint
17 did not contain a discernable cause of action.³¹ Upon Wells Fargo’s motion, this Court entered
18 an order dismissing the complaint and expunging the *lis pendens* on August 17, 2011.³²
19 Toromanova later filed another complaint concerning the subject property against Wells Fargo in
20 state court, which Wells Fargo removed to this Court.³³ Upon Wells Fargo’s Motion to Dismiss,
21 this Court entered an order dismissing Toromanova’s claims against Wells Fargo as barred by

22 ²⁶ See *Twombly*, 550 U.S. at 555 (“a plaintiff’s obligation to provide the ‘grounds’ of his ‘entitlement to
23 relief’ requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will
24 not do”).

25 ²⁷ *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009).

26 ²⁸ *Moss v. U.S. Secret Service*, 572 F.3d 962, 970 (9th Cir. 2009) (quoting *Iqbal*, 129 S. Ct. at 1950).

27 ²⁹ See *Lee v. City of Los Angeles*, 250 F.3d 668, 688 (9th Cir. 2005).

28 ³⁰ See Quo Warranto Complaint (Doc. 1), Case No. 2:10-cv-02193-PMP-(GWF).

29 ³¹ *Id.*

30 ³² See Order (Aug. 17, 2011) (Doc. 21), Case No. 2:10-cv-02193-PMP-(GWF).

31 ³³ See Compl.; see also Petition.

1 *res judicata*.³⁴ Nevertheless, Toromanova includes a myriad of claims against Wells Fargo in
 2 her Amended Complaint. Because this Court twice dismissed Toromanova's claims against
 3 Wells Fargo, the Court should enter an order dismissing the Amended Complaint as to Wells
 4 Fargo as *res judicata* bars Toromanova's claims.³⁵

5 **C. Toromanova fails to state a claim upon which relief can be granted.**

6 **1. Toromanova lacks standing to challenge the foreclosure as she has**
 7 **failed to tender the amount due on the Note.**

8 To contest the validity of a foreclosure action, the borrower must tender the undisputed
 9 amount due and payable to the lender on the secured debt.³⁶ Notably, the "tender rule" applies to
 10 any cause of action regarding irregularities in the sales procedure.³⁷ Should a defaulted borrower
 11 seek equitable judicial relief, the borrower must first "do equity" himself.³⁸ "The essential
 12 requisites of tender are: (1) An unconditional offer to perform, coupled with a manifested ability
 13 to carry out the offer; (2) A production of the subject matter of the contract; (3) The property
 14 tendered must not be less than what is due; and (4) If greater, there must be no demand for a
 15 return of the excess."³⁹ Importantly, courts enforce the tender rule strictly and have denied relief
 16 even when financial hardship prevents a borrower from tendering payment.⁴⁰ Here, as set forth
 17 in Wells Fargo's prior Motion to Dismiss, Toromanova does not allege that she paid the amount
 18 due on her loan, nor does she indicate that she is even willing to do so.⁴¹ Accordingly,

19 ³⁴ See Order (Doc. 21).

20 ³⁵ See *Huggins v. Bank Deutsche Nat'l Tr Co Trs*, 2011 WL 2976818, *2 (D. Nev. Jul. 21, 2011) ("Fed. R.
 21 Civ. P. 41(b) provides that any dismissal, except for one for lack of jurisdiction, improper venue, or failure to join a
 22 party under Rule 19, operates as a final judgment on the merits").

23 ³⁶ See *Abdallah v. United Sav. Bank*, 51 Cal. Rptr. 2d 286, 292 (Cal. Ct. App. 1996).

24 ³⁷ *Id.*

25 ³⁸ See *NOLM, LLC v. County of Clark*, 100 P.3d 658, 663 (Nev. 1987).

26 ³⁹ *Guy F. Atkinson co. v. Commissioner of IRS*, 814 F.2d 1388, 1393 (9th Cir. 1987).

27 ⁴⁰ See *Karlsen v. Am. Sav. & Loan Ass'n*, 92 Cal. Rptr. 851, 854–55 (Cal. Ct. App. 1971); see also *Kraemer v.*
 28 *Kraemer*, 382 P.2d 394, 396 (Nev. 1963) (denying recovery of property despite evidence of fraud and procedural
 irregularities because plaintiff could not afford to redeem the property); *Hill v. Filsoof*, 618 S.E.2d 12, 14 (Ga. Ct.
 App. 2005) ("[n]either fraud nor poverty constitute an equitable excuse for failure to tender").

⁴¹ See generally Am. Compl.

1 Toromanova lacks standing to challenge the foreclosure and the Court should enter an order
2 dismissing Toromanova's Amended Complaint.

3 **2. As the holder of the Note and beneficiary of the Deed of Trust, Wells**
4 **Fargo was entitled to foreclose on the Property.**

5 In her Amended Complaint, Toromanova continues to rely on the false premise that the
6 Note and/or the Deed of Trust was or were improperly transferred or assigned and, therefore,
7 Wells Fargo did not have a right to foreclose on the Property. However, as explained in Wells
8 Fargo's prior Motion to Dismiss, the beneficiary of the Deed of Trust is identified in the trust
9 document as "Lender," and "Lender" is defined as "World Savings Bank, FSB."⁴² Although the
10 original "Lender," World Savings Bank, FSB ("World Savings"), no longer exists, Wells Fargo
11 provided judicially noticeable documents showing that World Savings underwent a series of duly
12 noticed and officially acknowledged name changes, via merger, name change or acquisition, to
13 become Wachovia Mortgage, a division of Wells Fargo Bank, N.A.⁴³ As the successor in
14 interest to World Savings, Wells Fargo is the beneficiary entitled to foreclose upon the property.

15 Rather than accept the simple truth that her loan never left the originator's hands,
16 Toromanova alleges repeatedly that Wells Fargo violated an unidentified Pooling and Servicing
17 Agreement by failing to properly endorse or assign the Note or the Deed of Trust to a mortgage
18 pooling trust which Toromanova's loan was purportedly transferred to.⁴⁴ However, Toromanova
19 fails to allege any facts to support her assumption that the loan was securitized or transferred in
20 any way.⁴⁵ Indeed, as evidenced by the documents themselves, and even according to
21 Toromanova's own allegations, neither the Note nor the Deed of Trust was ever assigned.⁴⁶

22 ⁴² See Deed of Trust at 1-2.

23 ⁴³ See Federal Deposit Insurance Corporation notice and history of World Savings Bank's name change to
24 Wachovia Mortgage (Doc. 5-2), attached to the Opp. to Mot. for Prelim. Inj. as Exhibit 2; Official Certification of
25 the Comptroller of the Currency regarding merger (Doc. 5-3), a copy of which is attached to the Opp. to Mot. for
Prelim. Inj. as Exhibit 3; Charter of Wachovia Mortgage (Doc. 5-4), attached to the Opp. to Mot. for Prelim. Inj. as
Exhibit 4.

26 ⁴⁴ See, e.g., Am. Compl. at ¶¶ 4, 17-24.

27 ⁴⁵ See generally Am. Compl.

28 ⁴⁶ See Note; Deed of Trust; see also Am. Compl. at ¶ 18.

Therefore, Wells Fargo had the right to foreclose upon the Property in satisfaction of the Note. Accordingly, Wells Fargo (1) did not misrepresent to Toromanova that it was entitled to exercise the power of sale granted by the Deed of Trust,⁴⁷ (2) did not intentionally inflict emotional distress on Toromanova by “fraudulently attempting to foreclosure (sic.) on a property in which they have no right, title or interest,”⁴⁸ (3) did not commit slander of title by foreclosing on the Property,⁴⁹ and (4) did not violate Nevada’s Deceptive Trade Practices statutes by foreclosing on the property.⁵⁰ Consequently, the Court should dismiss the Amended Complaint with prejudice.

3. Toromanova’s claim for unjust enrichment fails as a matter of law.

The only claim in Toromanova’s Amended Complaint that does not appear to rely solely on her theory that Wells Fargo is not entitled to enforce the Note is Toromanova’s claim for unjust enrichment.⁵¹ “The doctrine of unjust enrichment or recovery in quasi contract applies to situations where there is no legal contract but where the person sought to be charged is in possession of money or property which in good conscience and justice he should not retain but should deliver to another or should pay for.”⁵² However, Toromanova fails to allege facts that, if true, would establish that there was no contract, or that she is entitled to any insurance proceeds Wells Fargo allegedly received.⁵³ Therefore, Toromanova’s claim for unjust enrichment fails as a matter of law.

⁴⁷ See Am. Compl. at ¶ 60.

⁴⁸ *Id.* at ¶ 69.

⁴⁹ *Id.* at ¶ 80.

⁵⁰ *Id.* at ¶ 103.

⁵¹ *Id.* at ¶ 98.

⁵² *Leasepartners Corp. v. Robert L. Brooks Trust Dated November 12, 1975*, 113 Nev. 747, 756, 942 P.2d 182, 187 (1997) (quoting 66 Am.Jur. 2d Restitution § 11).

⁵³ See generally Am. Compl.

1 **IV. CONCLUSION**

2 For the foregoing reasons, Wells Fargo respectfully requests that the Court grant its
3 Motion and enter an order dismissing Toromanova's claims with prejudice.⁵⁴

4 DATED this 6th day of August 2012.

5 DAVID J. MERRILL, P.C.

6
7 By: 

8 DAVID J. MERRILL
9 MORGAN F. SHAH
10 10161 Park Run Drive, Suite 150
11 Las Vegas, Nevada 89145
12 (702) 566-1935

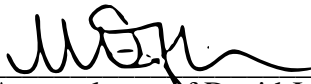
13 Attorneys for WELLS FARGO BANK, N.A.
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27 ⁵⁴ See *Kendall v. Visa USA, Inc.*, 518 F.3d 1042, 1051 (9th Cir. 2008) ("Dismissal without leave to amend is
28 proper if it is clear that the complaint could not be saved by amendment.").

CERTIFICATE OF SERVICE

Pursuant to Fed. R. Civ. P. 5(b), I hereby certify that on the 6th day of August 2012, service of the foregoing Motion to Dismiss Amended Complaint was made to all counsel in the action through the Court's CM/ECF system. In addition, service was made to the plaintiff by placing a copy in the United States Mail, postage prepaid and addressed to the following at her last known address:

Dimitritza Toromanova
2912 Hot Cider Avenue
North Las Vegas, Nevada 89031


An employee of David J. Merrill, P.C.